Aloha Temporary Service, Inc. *and* Local Union 654, International Brotherhood of Electrical Workers, AFL–CIO *and* Local Union 313, International Brotherhood of Electrical Workers, AFL–CIO. Cases 4–CA–23173 and 4–CA–23204

August 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On June 16, 1995, Administrative Law Judge Judith A. Dowd issued the attached decision. The General Counsel filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings, and conclusions,[1] to amend the remedy,[2] and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Aloha Temporary Service, Inc., Newark, Delaware, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

''(b) Remove from its files any reference to the unlawful refusal to hire or to refer the above-named employees, and notify each employee in writing that this has been done and that these actions will not be used against them in any way.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to hire or to refer applicants for employment because of their union affiliation.

WE WILL NOT coercively interrogate job applicants concerning their union affiliation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees or applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make James Conroy, James Clothier, Louis Pietschmann, and Kevin Cochard whole for any loss of earnings suffered by reason of our discrimination against them.

WE WILL offer the named discriminatees who would have been employed or referred for employment, but for our refusal to consider them for hire, employment or referral for employment in the positions for which they applied, or if those jobs no longer exist, to substantially equivalent positions.

WE WILL remove from our files any reference to the unlawful refusal to hire or to refer the above-named employees and we will notify each of them in writing that this has been done and that these actions will not be used against them in any way.

ALOHA TEMPORARY SERVICES

H. P. Baker and *Dorothy L. Moore-Duncan, Esqs.*, for the General Counsel.
James E. Campion Jr., Esq., of Philadelphia, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

JUDITH A. DOWD, Administrative Law Judge. On October 6, 1994, Local 654, International Brotherhood of Electrical Workers (Local 654), filed a charge alleging that Aloha Temporary Service, Inc. (Respondent), had engaged in certain unfair labor practices that violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). On October 17, 1994, Local 313, International Brotherhood of Electrical Workers (Local 313), also filed charges alleging that Respondent violated Section 8(a)(1) and (3) of the Act. Subsequently, both of these charges were amended. On December 30, 1994, an order consolidating cases, consolidated complaint, and notice of hearing was issued in the above-num-

[1] In her decision, the judge found that the Respondent violated Sec. 8(a)(3) and (1) of the Act by failing to hire or to refer four employees because of its anti-union animus. The judge, however, inadvertently omitted reference to the failure to refer in the conclusions of law and the notice. Accordingly, we shall substitute a new notice and we correct par. 3 of the conclusions of law as follows:

3. By refusing to hire or to refer James Conroy, James Clothier, Louis Pietschmann, and Kevin Cochard because of their union affiliation, the Respondent violated Section 8(a)(3) and (1) of the Act.

The judge also found that the Respondent violated Sec. 8(a)(1) of the Act by interrogating an applicant concerning his union affiliation. In the notice, however, she inadvertently omitted a provision concerning the interrogation. We shall correct this omission.

[2] We amend the judge's remedy to provide that interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, we shall modify the judge's recommended Order to require the Respondent to remove from its records any references to its unlawful actions against the discriminatees.

bered cases. An amendment to consolidated complaint was filed on February 10, 1995. The consolidated complaint and amendment thereto allege, inter alia, that Respondent violated Section 8(a)(3) and (1) of the Act when it refused to consider and to hire employment applicants James Conroy, James Clothier, Louis Pietschmann, and Kevin Cochard because of their union affiliation. The complaint further alleges that Respondent violated Section 8(a)(1) of the Act by interrogating a job applicant concerning his union affiliation.

This case was tried at Philadelphia, Pennsylvania, on February 27, 1995. At the hearing, all parties were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the hearing, Respondent and the General Counsel filed briefs. Upon consideration of the entire record, including my observation of the witnesses and their demeanor, as well as the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, with an office in Newark, Delaware, is engaged in the business of locating, placing, and employing temporary employees at its clients' jobsites. During the calendar year 1994, Respondent provided services in excess of $50,000 to customers located outside the State of Delaware. Respondent admitted that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[1]

II. THE LABOR ORGANIZATION

At all times material, Local 654 and Local 313, International Brotherhood of Electrical Workers (IBEW) (sometimes collectively referred to as the Union), have been labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent provides skilled and unskilled construction workers and other types of employees to clients who have need for temporary workers. David Jwanisik is Respondent's owner and president. Carrie Swasey is Respondent's office manager and Trudy Barwick is the administrative assistant and secretary.

On September 26, 1994, a ''help wanted'' advertisement appeared in the Wilmington News Journal newspaper seeking five electricians for ''steady'' commercial work and giving Respondent's telephone number. On October 3, James Conroy, James Clothier, Louis Pietschmann, and Kevin Cochard drove to Respondent's office to apply for the positions. When they arrived around 9 a.m., they met Barwick and asked her whether Respondent was hiring electricians. Barwick told them Respondent was hiring and asked them to complete applications.[2] Each application showed that the applicant was affiliated with either Local 654 or Local 313, or that he had trained under the Union's apprenticeship program. After the applicants completed the forms, each of them was interviewed by Jwanisik.

During their interviews, Conroy and Clothier informed Jwanisik that they were union organizers. Contrary to what Barwick told the applicants when they arrived at Respondent's office, Jwanisik told each of them that there were no electrician jobs available, but that they should call back later.

On October 5, 1994, another advertisement appeared in the Wilmington News Journal, stating that Respondent needed five electricians or electrician apprentices. On that same day, Stephen Watson, Robert Belardo, and James Conroy drove together to Respondent's office, so that Watson and Belardo could apply for the electrician jobs. Watson entered Respondent's office alone. He completed all the required sections of the application, dated it October 5, 1994, and waited for an interview.

Approximately 15 minutes after Watson had entered, Conroy and Belardo came into Respondent's office. Conroy introduced Belardo to Barwick as a friend of his who was applying for work. Watson did not acknowledge Belardo and Conroy when they came into the waiting area. Belardo completed an application, dated it October 5, 1994, and indicated on it that he had completed the apprenticeship program sponsored by the IBEW. Watson, Belardo, and Conroy then sat in the waiting area, while Belardo and Watson awaited interviews with Jwanisik.

As soon as Jwanisik entered the waiting area, Conroy asked him if there was any work available and Jwanisik answered, ''[N]o.''[3] Jwanisik then called Watson in for his interview. Watson had no experience as a union electrician and his application made no reference to the Union. During the interview, Jwanisik and Watson discussed his application, including Watson's prior work history. Jwanisik told Watson that there were electrician jobs available and he offered Watson employment with a contractor named Angelini. Watson accepted the job.

Jwanisik and Watson then discussed and agreed upon a wage rate. As Watson was about to leave, Jwanisik asked him whether he knew ''anybody out in the other room.'' Watson replied that he did not, even though he knew Conroy and Belardo. Jwanisik instructed Watson ''not to discuss any of the things that [they] had just gone over with anybody in the other room.'' At the conclusion of the interview, Watson

[1] While Respondent's answer contains no response to the paragraph in the complaint alleging that it is an employer within the meaning of Sec. 2(2), (6), and (7) of the Act, Respondent acknowledged at the hearing that the allegations it failed to deny are admitted.

[2] It is clear that Barwick is in a position to speak authoritatively on this subject. She testified that her duties included receiving clients' requests for employees and answering applicants' phone inquiries. Barwick stated that if an applicant inquires whether work is available, and there are positions open for which they may qualify, she tells them there are openings or ''maybe we'll have something coming up soon.'' If there are no jobs available of the type the applicant is seeking, Barwick will ''usually tell them that.''

[3] I credit the testimony of General Counsel's witness Conroy that Jwanisik told him there was no electrical work when he visited Respondent's office on October 5, rather than the testimony of Jwanisik that Conroy never asked about employment on that date. It is uncontested that Conroy and Belardo were in Respondent's office on October 5 and that Jwanisik spoke to Conroy at that time. I find it more credible that Conroy, who was actively seeking employment, would have asked Jwanisik about the hiring situation when he saw him, rather than say nothing about it, as Jwanisik maintained.

left Respondent's office. Watson began working for Angelini on October 6, 1994.[4]

After Watson left, Jwanisik called Belardo in for his interview. Belardo and Jwanisik discussed the applicant's work history, which included work for IBEW, Local 269. Belardo also told Jwanisik that he was a union member. Jwanisik informed Belardo that he had no electrician jobs available at the time but that he would call Belardo the following Friday.

Jwanisik did not call Belardo as promised. After October 5, 1994, Conroy telephoned Respondent approximately 40 to 50 times to find out if work was available. Each time, Conroy spoke to Barwick or Jwanisik. Barwick either told him that there were no jobs or that he would have to speak to Jwanisik. On the occasions when Conroy spoke to Jwanisik, the latter told him that no jobs were available. Clothier called Respondent's office about five times after he completed his application. Each call was the same. Clothier identified himself and was promptly placed on hold. After 10 or 15 minutes of waiting, Clothier would finally hang up. Similarly, Pietschmann called Respondent two or three times after his interview and was either put on hold, or told that no jobs were available.

IV. ANALYSIS AND CONCLUSION

A. *The Alleged Refusal to Hire*

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 453 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), the General Counsel must ''make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the Employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.'' *Wright Line*, supra at 1089 (footnote omitted). Subsequently, the Board found that it was ''unnecessary formally to set forth [the *Wright Line*] analysis . . . . where an Administrative Law Judge has evaluated the employer's explanation for its action and concluded that the reasons advanced by the employer were pretextual, [which] determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon.'' *Limestone Apparel Corp*., 255 NLRB 722, 722 (1981).

Jwanisik's explanation for failing to hire or to refer Conroy, Clothier, Pietschmann, and Cochard rests upon his claim that Watson applied for work before they came to the office. Jwanisik testified that Watson and the alleged discriminatees all filed applications for employment on October 3, but that Watson came in earlier in the day and was offered the single electrician's job available at that time. For the reasons stated in footnote 4, supra, I have credited the testimony of Watson that he applied for work on October 5, 2 days after the alleged discriminatees. This timing is critical, since according to Jwanisik's testimony, Respondent hires applicants in the order in which they filed their job applications, within the skill group for which they qualify. Under Respondent's procedures, if an electrician job had to be filled, the name of the first electrician applicant would be taken from the data bank maintained by Respondent, and that individual would be contacted and offered the job. If the first applicant could not be contacted or refused the job offer, Respondent would then contact the next electrician who had filed an application, and so on. The credited evidence shows that Conroy, Clothier, Pietschmann, and Cochard filed job applications 2 days before Watson applied. Therefore, under Respondent's procedures, one of the alleged discriminatees should have been contacted and offered the Angelini job rather than Watson. Indeed, it is unexplained on this record why Jwanisik did not offer the Angelini job to Conroy, who was sitting in his waiting room, rather than to new applicant Watson.

On the facts of this case, my decision to credit Watson's testimony concerning the date of his job application and to discredit Respondent's version amounts to a finding that the Respondent's stated reasons for failing to hire or to refer the alleged discriminatees are pretextual. The only remaining motive for Respondent's actions is a desire to avoid hiring or referring union adherents. Accordingly, I find that Respondent's failure to refer or to hire Conroy, Clothier, Pietschmann, and Cochard was motivated by antiunion animus and violated Section 8(a)(3) and (1) of the Act.

B. *The Alleged Unlawful Interrogation*

The complaint alleges that Respondent, through David Jwanisik, violated Section 8(a)(1) of the Act by interrogating an employee concerning the employee's union affiliation. The standard for determining whether an interrogation is coercive is well established. The issue is ''whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act'' (footnote omitted). *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1217 (1985). Accord: *Rossmore House*, 269 NLRB 1176 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985). *Blue Flash Express*, 109 NLRB 591 (1954). Furthermore, it is also

[4] According to Jwanisik's testimony, which was supported, in part, by Barwick, Watson did not come into the office and file an application on October 5, 1994, but he came in early in the morning of October 3, sometime prior to the arrival on the same day of Conroy and the other alleged discriminatees. Jwanisik testified that Watson was hired for the last electrician job available at that time.

I credit Watson's testimony that he came to Respondent's office to apply for employment on October 5, 1994. Watson's testimony is directly supported by Conroy and Belardo, both of whom testified that they drove to Respondent's office with Watson on October 5, so that Watson and Belardo could file job applications. Furthermore, Belardo's job application is dated October 5 and so is that of Watson. While the October 5 date is crossed out on Watson's application and October 3 is written in, Respondent's President Jwanisik admitted that he himself made that change at a later time, ostensibly to correct the wrong date. Watson's employment application also shows that he gave October 6 as the first date that he was available for employment. Nevertheless, under Respondent's account of Watson's hiring, the employee was referred to Angelini on October 3, 3 days prior to the date Watson indicated availability for work.

Further doubt is cast on Respondent's contention that Watson filed his job application on October 3 by the absence of any records showing that he was referred to or worked for Angelini anytime prior to October 6. Record evidence shows that Watson was paid by checks issued by Respondent for the work he performed for Angelini. Respondent offered no explanation for failing to produce any of its referral or payroll records for Watson showing that he worked on any date prior to October 6. Accordingly, I credit Watson's well-supported testimony that he applied for work at Respondent's offices on October 5, 1994, and his further testimony regarding his interview with Jwanisik.

well established that ''questions involving union membership and union sympathies in the context a job interview are inherently coercive and thus interfere with Section 7 rights.'' *Service Master-All Cleaning Services*, 267 NLRB 875, 875 (1983), and cases cited.

The General Counsel contends in his brief that Jwanisik coercively interrogated employee Watson when he applied for work on October 5, 1994. The basis for this allegation consists of the following testimony by Watson concerning his interview with Jwanisik:

> Q. How did the interview end?
> A. We agreed on the price [wages], and he asked me if I knew anybody out in the other room.
> Q. Which room was that?
> A. The waiting room, and I said no. And he said just not to discuss any of the things that we had just gone over with anybody in the other room.
> Q. Did you know anybody in the waiting room?
> A. Yes.
> Q. Who did you know in the waiting room?
> A. Mr. Conroy, Mr. Belardo.

Under Jwanisik's version of the facts, the above-quoted exchange never occurred because Watson applied for work prior to the time that Conroy first came to Respondent's office. I have already credited Watson over Jwanisik with respect to their discussion during Watson's job interview, supra, footnote 4. The only issue, therefore, is whether Jwanisik's statements constituted an unlawful interrogation.

While on its face Jwanisik's question about whether Watson knew anyone in the waiting room appears to be noncoercive, it is clear that the question referred to Conroy and Belardo. There is no evidence showing that anyone other than these two individuals and Respondent's employee Barwick were in the outer office at the time. The exchange as a whole clearly shows that Jwanisik was not asking Watson if he knew Barwick. Jwanisik's inquiry and subsequent warning about not talking to ''anybody'' in the waiting area reasonably can be interpreted only to mean Conroy and Belardo.

Since Jwanisik denied asking the question he did not, of course, offer any explanation as to why he wanted to know whether Watson knew Conroy and Belardo. As the General Counsel argues in his brief, the only reasonable inference to be drawn from the inquiry is that Jwanisik wanted to know if Watson was associated with the Union. Jwanisik's admonition to Watson not to tell ''anybody in the other room'' what they had just discussed clearly would have conveyed to Watson that his union relationship was significant to Jwanisik, since Watson knew about Conroy's position with the Union and was aware of the results of the earlier applications filed by Conroy and the other union adherents.

As noted above, questions about an applicant's union sympathies in the context of a job interview are inherently coercive. Although Watson had already been offered the Angelini job, the offer could easily have been withdrawn by Jwanisik before the interview was terminated. Moreover, the fact that Watson denied knowing anyone in the waiting area suggests that Watson believed that he risked losing the job offer if he admitted that he knew Conroy, the union organizer.

Considering all of the facts surrounding Jwanisik's interview with Watson, I find that the Jwanisik's question about whether Watson knew anybody in the waiting area was coercive. Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act by coercively interrogating a job applicant about his union affiliation.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and 7 of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By refusing to hire James Conroy, James Clothier, Louis Pietschmann, and Kevin Cochard because of their union affiliation, Respondent violated Section 8(a)(3) and (1) of the Act.
4. By coercively interrogating job applicant Stephen Watson concerning his union affiliation, Respondent violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Respondent having unlawfully refused to offer employment to, or to refer, James Conroy, James Clothier, Louis Pietschmann, and Kevin Cochard, it is recommended that Respondent be required to hire or to refer for employment and to provide backpay to those applicants who would have been hired or referred for employment but for its unlawful conduct, in accordance with the principles enunciated in *Ultrasystems Western Constructors*, 316 NLRB 1243 (1995).

Backpay, if any, shall be determined at the compliance stage. Any backpay found to be due shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall include interest in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Aloha Temporary Service, Inc., Newark, Delaware, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire or to refer applicants for employment because of their affiliation with a union.

(b) Coercively interrogating job applicants concerning their union affiliation.

(c) In any like or related manner interfering with, restraining, or coercing employees or job applicants with respect to the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole applicants James Conroy, James Clothier, Louis Pietschmann, and Kevin Cochard for any losses they may have suffered by reason of Respondent's discriminatory

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

refusal to consider them for hire. Offer the named discriminatees who would have been employed or referred for employment but for Respondent's refusal to consider them for hire employment or referral for employment in the positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its premises copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''